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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

WARDEN, LEWISBURG PENITENTIARY, PETITIONER

v.

BENIGNO MARRERO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Warden of Lewisburg Penitentiary, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*), and the Memorandum and Order of the United States District Court for the Middle District of Pennsylvania (App. C, *infra*) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 27, 1973. On October 25, 1973, Mr. Justice Brennan granted a stay of man-

date pending timely filing of a petition for a writ of certiorari, and continuing thereafter until this Court determines this matter. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision in 26 U.S.C. (1964 ed.) 7237 (d) that certain narcotics offenders are not eligible for parole under 18 U.S.C. 4202 survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, so that a narcotics offender who committed his offenses before the effective date of the new statute may not be considered for parole although he has completed service of more than one-third of his sentence.

STATUTES INVOLVED

Section 7237 of the Narcotic Control Act of 1956, 70 Stat. 568, as amended, 26 U.S.C. (1964 ed. and Supp. V) 7237, provided in pertinent part:

> (a) Where no specific penalty is otherwise provided.
>
> Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be impris-

oned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

* * * * *

(d) No suspension of sentence; no probation; etc. Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24–201 and following), as amended, shall not apply [Repealed, effective May 1, 1971, § 1101(b)(4)(A), Pub. L. 91–513, 84 Stat. 1292; § 1105(a), Pub. L. 91–513, 84 Stat. 1295].

SEC. 1103(a) Prosecutions for any violation Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1294, provides in pertinent part:

> SEC. 1103(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

Section 109 of the Act of July 30, 1947, 61 Stat. 635, 1 U.S.C. 109, provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability * * *.

The general parole statute, 18 U.S.C. 4202, provides as follows:

> § 4202. Prisoners eligible.
>
> A Federal prisoner, other than a juvenile delinquent or a committeed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years. (June 25, 1948, ch. 645, 62 Stat. 854; July 31, 1951, ch. 277, 65 Stat. 150.)

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on a two count indictment of having received, facilitated the transportation of, and concealed heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174 (count 1) and of having purchased, dispensed and distributed cocaine not in or from its original stamped package, in violation of 26 U.S.C. (1964 ed.) 4701, 4703, 4704(a), 4771(b), and 7237(a) (count 2). On May 27,

1970 (before the May 1, 1971, effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970), he was sentenced as a second offender to concurrent terms of ten years' imprisonment on each count. The court of appeals affirmed (450 F. 2d 373 (C.A. 2)), and this Court denied certiorari, 405 U.S. 933. Marrero is now serving that sentence in the federal penitentiary at Lewisburg, Pennsylvania.

2. On February 24, 1972, Marrero filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. He claimed that since the statute in effect at the time of his sentencing (26 U.S.C. (Supp. V, 1964 ed.) 7237(d))—under which he was ineligible for parole under 18 U.S.C. 4202—was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, he should be eligible for parole under 18 U.S.C. 4202 in September 1973, when one-third of his sentence had been served.[1] The district court held that the 1970 statute did not repeal the prohibition on parole eligibility in the prior statute, on the ground that such prohibition was a penalty whose existence was continued by the specific savings provisions of Section 1103(a) of the 1970 statute and the Act of July 30, 1947 (1 U.S.C. 109) (App. C, *infra*). The Court of Appeals for the Third Circuit reversed, holding that the 1970

[1] Marrero actually became eligible for parole on June 20, 1973, if 18 U.S.C. 4202 is applicable to him. Neither court below considered whether habeas corpus relief was appropriate before that date, a question that now appears to be moot.

statute had repealed the prohibition on parole eligibility in the prior act (App. A, *infra*). It granted the writ and directed that Marrero be released unless he were considered for parole within 60 days. The mandate has been stayed pending this Court's determination.

REASONS FOR GRANTING THE WRIT

In *Bradley* v. *United States*, 410 U.S. 605, this Court held that 26 U.S.C. (1964 ed.) 7237(d) survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 so as to prohibit suspended sentences, probation, and parole under 18 U.S.C. 4208(a) for narcotics sellers who committed their offenses before the effective date of the new statute. The majority did not reach the question at issue here—whether such offenders are eligible for parole under the general parole statute, 18 U.S.C. 4202—since it did not believe that question was yet ripe for review on the facts of that case.[2] Two members of this Court did reach that question and concluded that parole under Section 4202 was also unavailable.[3]

---

[2] 18 U.S.C. 4208(a) permits the judge at sentencing to specify a minimum term after which the defendant shall become eligible for parole. If no such designation is made, the general parole statute, 18 U.S.C. 4202, provides that a federal prisoner is eligible for parole after he has served one-third of his sentence. Under both statutes, the Parole Board must, when the prisoner becomes eligible, determine whether or not to place him on parole.

[3] Mr. Justice Brennan and Mr. Justice White filed a separate statement, 410 U.S. at 611–612, in which they declared:

> * * * [T]hey are also of the view that § 1103(a) [the specific savings clause of the 1970 Act] forecloses the avail-

Since Marrero seeks a determination that he is now eligible for parole under 18 U.S.C. 4202, the issue reserved in *Bradley* is now ripe for resolution by this Court. The courts of appeals are in conflict on the issue,[4] and an authoritative resolution of the conflict by this Court is necessary.

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ability of parole under both 18 U.S.C. § 4202 and 18 U.S.C. § 4208(a), and that even if this were debatable as to § 4202, that the general saving statute, 1 U.S.C. § 109 clearly mandates that conclusion as to that section. * * *

[4] The Fourth, Fifth, and District of Columbia Circuits agree with the court below. See *Alcarado* v. *McLaughlin*, No. 73–1111 (C.A. 4; decided October 23, 1973); *Amaya* v. *Board of Parole*, No. 72–3142 (C.A. 5; decided November 9, 1973); and *United States* v. *Marshall*, No. 71–1801 (C.A.D.C.; decided September 12, 1973). The Tenth Circuit has held that the Board of Parole is without authority to consider parole for such prisoners. *Perea* v. *United States Board of Parole*, 480 F. 2d 608.

The Ninth Circuit, before *Bradley*, had held that those sentenced before the effective date of the new act did not become eligible for parole by virtue of the passage of that act. *Noriega-Arjona* v. *U.S. Bureau of Prisons*, 464 F. 2d 561. A panel of the Second Circuit, in *United States* v. *Huguet*, 481 F. 2d 888, 891 noted that another panel had previously indicated that parole would not be available under Section 4202 for offenses committed under the old act (*United States* v. *DeSimone*, 468 F. 2d 1196), but stated that, after the *Bradley* decision, "previous expressions of ours on this subject cannot be regarded as controlling." The question at issue here must therefore now be considered open in the Second Circuit. Similarly, although the First Circuit's decision in *Bradley* (455 F. 2d 1181) did not distinguish between parole under Sections 4208(a) and 4202, but simply held parole unavailable, the question must be considered open in the First Circuit in light of this Court's conclusion in its *Bradley* decision that the issue of parole under Section 4202 had not been properly before the court of appeals.

Before *Bradley*, the Seventh Circuit stated in *United States* v. *McGarr*, 461 F.2d 1, that the parole ineligibility provisions of the old act were repealed by the new act.

This conflict creates a serious problem for the Bureau of Prisons and the Board of Parole. Currently, the parole eligibility of narcotics offenders incarcerated for violations of the Narcotic Control Act of 1956 varies depending on the circuit in which they were sentenced (see *Bradley, supra,* 410 U.S. at 610, n. 5) or in which they are confined.[4a] It is obviously unjust to have eligibility for parole turn on the fortuitous circumstance of the place of confinement, with prisoners at Leavenworth (in the Tenth Circuit) ineligible, while those at Lewisburg (Third Circuit) or Atlanta (Fifth Circuit) are considered for parole.

Neither the Bureau nor the Board would object to considering all such offenders eligible for parole under 18 U.S.C. 4202, since the grant of parole reflects a determination that supervised release from confinement is in the interests of both the prisoner and society;[5] however, these agencies are obliged to execute the will of Congress, and it appears to them that they do not have the authority to consider paroling such offenders, for the reasons explained at length in our brief in *Bradley*[6] and summarized herein.

1. Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 provides that "prosecutions" for violations occurring under the old act are not to be affected. *Bradley* establishes that such "prosecutions" include sentencing, and thus that

[4a] The Board of Parole has changed the policy noted in *Bradley*. It now treats all prisoners in Marrero's position as ineligible for parole (in the absence of an unstayed court order requiring different treatment).

[5] Obviously, a holding in favor of parole eligibility does not require the *release* of any prisoner on parole.

[6] We are sending a copy of our brief in *Bradley* to respondent.

the prohibition in 26 U.S.C. 7237(d) on suspended sentences, probation, and judicially designated parole eligibility under 18 U.S.C. 4208(a) survived the new act. Under the standards established in *Bradley,* eligibility for parole under 18 U.S.C. 4202 would also appear to be part of the sentence and thus of the "prosecution".

The Court in *Bradley* reasoned that parole eligibility under 18 U.S.C. 4208(a) is part of the sentencing process because the decision as to when an offender will become eligible for parole is, under that section, made by the judge at the time of sentencing (410 U.S. at 610–611). Viewed pragmatically, the decision as to when an offender will become eligible for parole under 18 U.S.C. 4202 is also made by the judge at the time of sentencing. To be sure, under Section 4208(a) the decision is made explicitly as part of the sentence, while, when Section 4202 applies, the decision is made implicitly by fixing the length of the sentence. Nevertheless, since judges are well aware of the provisions of Section 4202, an offender's eligibility for parole upon the expiration of one-third of his sentence is undoubtedly a factor which is ordinarily considered in imposing sentence.[7] Thus, the time when the offender becomes eligible for parole, whether under Section 4208(a) or under Section 4202, is a decision made by the trial judge

[7] Marrero could have been sentenced to as much as forty years' imprisonment under count 1 (21 U.S.C. 174) and twenty years' imprisonment under count 2 (see 26 U.S.C. 7237(a)). Although it is not possible to determine what sentence the trial judge would have imposed had he believed that Marrero might be eligible for parole under Section 4202, it is at least clear that the judge in imposing sentence did not contemplate Marrero's release after little more than three years.

at sentencing, and thus, under the teaching of *Bradley*, part of the prosecution saved by Section 1103.

The court below interpreted *Bradley* as concluding that the "parole eligibility decision" under Section 4202 is not part of sentencing (and therefore not included in the "prosecution" saved by Section 1103) because the decision to *grant* parole is not made until "long after sentence has been entered and the prosecution terminated." (App. A, *infra*, p. 11a).[8] Realistically, however, parole under Section 4202 is no different from parole under Section 4208(a), which *Bradley* held to be part of sentencing. Under both sections, the Parole Board decides whether to grant parole when the designated minimum period of incarceration has been served, some time after sentencing. But *Bradley* indicates that this is not significant—since the decision concerning the time at which an offender will become *eligible* for parole is made by the trial judge at sentencing under both sections, parole eligibility under both sections is part of the sentence, and thus of the prosecution.[9]

---

[8] We do not believe that the Court in *Bradley*, which "express[ed] no opinion" on the "rather different matter" of Section 4202 parole (410 U.S. at 611), meant to arrive at a definitive interpretation of the applicability of Section 1103. Rather, we think it was drawing a distinction showing the ripeness of the Section 4208 issue and the lack of ripeness of the Section 4202 issue. The question of ripeness of the Section 4202 issue and the distinction, if any, between that issue and the Section 4208 issue was not raised in the lower court proceedings in *Bradley*, nor was it briefed or argued to this Court.

[9] *Morrissey* v. *Brewer*, 408 U.S. 471, which indicates that the decision by administrative authorities to grant or deny parole is not part of the "prosecution" for purposes of the Sixth Amendment, is not inconsistent with this conclusion.

2. The general saving provision, 1 U.S.C. 109, provides that the repeal of a statute does not extinguish any penalty incurred under that statute unless expressly so provided.[10] Ineligibility for parole would appear to be a penalty under the 1956 Narcotic Control Act.[11] Although the majority in *Bradley* did not find it necessary to consider the general saving statute, Mr. Justice Brennan and Mr. Justice White in their separate statement agreed that it "clearly mandates" the

[10] 1 U.S.C. 109, originally enacted in 1871, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *.

At common law, when a criminal statute was replaced by another statute or was amended to lessen punishment, the defendant was entitled to the benefit of the new act, although his offense was committed prior to the effective date thereof, unless there was a general saving statute or a specific clause in the new act. *United States* v. *Reisinger*, 128 U.S. 398; *Moorehead* v. *Hunter*, 198 F. 2d 52 (C.A. 10).

[11] Beginning with *United States* v. *Reisinger*, *supra*, the general saving statute has been held to apply to criminal laws and the punishments attached to them, and the effect has been to preserve the vitality of an amended or repealed law for purposes of both prosecuting and punishing offenses committed while the law was in effect. See *Lovely* v. *United States*, 175 F. 2d 312 (C.A. 4); *Hurwitz* v. *United States*, 53 F. 2d 552 (C.A.D.C.); *Duffel* v. *United States*, 221 F. 2d 523 (C.A.D.C.); *United States* v. *Kirby*, 176 F. 2d 101 (C.A. 2); *United States* v. *Brown*, 429 F. 2d 566 (C.A. 5); *Faubion* v. *United States*, 424 F. 2d 437 (C.A. 10); *Maceo* v. *United States*, 46 F. 2d 788 (C.A. 5); *United States* v. *Smith*, 433 F. 2d 341 (C.A. 4); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5); *United States* v. *Taylor*, 123 F. Supp. 920 (S.D.N.Y.), affirmed on opinion below, 227 F. 2d 958 (C.A. 2).

conclusion that parole is not available for offenses committed under the old act (410 U.S. at 611–612).

Our *Bradley* brief discusses in detail the basis for our conclusion that Congress intended ineligibility for parole for narcotics offenses to be a penalty under the 1956 Act, and did not intend, in enacting the 1970 repeal, to ameliorate the severity of penalties already incurred (Br. 10–19). In summary, we showed that in the Narcotics Control Act of 1956, Congress intended to discourage narcotics trafficking by imposing very severe penalties, and that ineligibility for parole was considered an important element of those penalties. See H. Rep. No. 2388, 84th Cong., 2d Sess., pp. 65, 69; S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 5–6.

The 1970 Comprehensive Drug Abuse Prevention and Control Act added a rehabilitative goal to the basically punitive approach of the 1956 Act, and provided a more flexible approach for certain offenders. It retained the prohibition on probation and parole only for persons who engage "in a continuing criminal enterprise" involving narcotics violations. 21 U.S.C. 848.[12]

There is no indication that this flexibility was intended to benefit narcotics traffickers already con-

[12] If the ban on parole eligibility no longer applies to all offenses committed under the old law, the creation of this new category of non-parole-eligible offenses creates a serious dilemma: Either the Parole Board must inquire into the facts of each pre-May 1971 narcotics conviction to determine whether the offender would be eligible for parole under the standards set in the new act, or some offenders may be granted parole although they committed offenses for which parole is barred under both the old and new laws. Marrero is a second offender; the record does not disclose whether his offenses were of the type for which parole is unavailable under the new act.

victed; rather, it was intended to increase the likelihood that such persons would in the future be prosecuted and convicted, Congress having concluded that the severe penalties under the prior law impeded the prosecution and conviction of such offenders. See H. Rep. No. 91–1444 (Part 1), 91st Cong., 2d Sess., p. 11. The legislative history contains no evidence that Congress intended, by saving "prosecutions" in Section 1103 of the 1970 Act, to limit the broad effect of 1 U.S.C. 109 in saving penalties,[13] or that Congress in 1970 had any doubt that ineligibility for parole was part of the penalty under the old act which would be saved under the new one.

Even aside from the evidence of congressional intent, it seems apparent that the unavailability of parole is necessarily an integral part of the penalty for the crime. Indeed, several courts have held that it is such an important part of the penalty from the defendant's point of view that a guilty plea taken without informing the defendant of his ineligibility for parole is invalid. *Berry* v. *United States,* 412 F. 2d 189, 193 (C.A. 3); *Harris* v. *United States,* 426 F. 2d 99 (C.A. 6); *Bye* v. *United States,* 435 F. 2d 177 (C.A. 2); *Munich* v. *United States,* 337 F. 2d 356, 361 (C.A. 9) (failure to inform of ineligibility for probation or parole); *Jenkins* v. *United States,* 420 F. 2d 433, 437 (C.A. 10) (same). As the Second Circuit noted in *United States* v. *Ross,* 464 F. 2d 376, 379 (C.A. 2):

> While it is true that the granting of probation or parole does not extinguish a defendant's penal obligation, one would be hard pressed to

[13] It is significant that 1 U.S.C. 109 provides that penalties are to be saved unless the repealing statute "expressly provides" otherwise.

find a prison inmate who did not view the unavailability of parole as a penalty.

The court below avoided the effect of 1 U.S.C. 109 by concluding that it was "intended to obviate the common law's technical abatement of a prosecution by the repeal of the statute under which it proceeded. *Hamm* v. *Rock Hill,* 379 U.S. 306, 314 (1964)" (App. A, *infra,* p. 12a). It therefore concluded that the purpose of that section would not be furthered by applying it to preclude parole eligibility under Section 4202.[14] In our view, however, *Hamm* v. *Rock Hill* simply does not support this conclusion. In that opinion, this Court cited, as an example of a situation in which the general saving statute would apply to prevent a technical abatement, the case of a new statute substituting more severe penalties for those originally applicable (379 U.S. at 314). It distinguished such a situation from the one before it, in which the defendant had been convicted under state trespass statutes for peacefully sitting-in at public lunch counters. That conduct had become affirmatively protected by statute and thus transformed into a right.[15] Although, in the present case, the new statute ameliorated the penalties previ-

[14] This analysis is inconsistent with the statement of Justices Brennan and White in *Bradley;* it also finds no support in the majority opinion, which at least implies the applicability of 1 U.S.C. 109.

[15] In *Pipefitters* v. *United States,* 407 U.S. 385, this Court similarly distinguished *Hamm* as applying only where a right is substituted for a crime. Although subsequent legislation there made lawful what had been a crime, the Court held that the general saving statute left the pre-trial conduct fully punishable. Significantly, the Court reached that conclusion even after finding that there was no demonstration of specific congressional intent on this point when the new act was passed.

ously applicable rather than increasing them, Section 109 nonetheless applies to prevent abatement, since no new right has been created or recognized. Indeed, this Court has applied Section 109 to avoid abatement even when the conduct involved was no longer a crime under the new law. See *Pipefitters* v. *United States,* 407 U.S. 385 *supra; Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 553; *Hertz* v. *Woodman,* 218 U.S. 205; *United States* v. *Reisinger, supra.*

The offense of selling cocaine has undergone no such transmutation from prohibited crime to protected right as had the conduct in *Hamm.* Indeed, unlike the conduct in *Pipefitters, Allen, Hertz,* and *Reisinger,* respondent's conduct remained criminal under both the old and new acts; the new act simply altered the specific elements of certain offenses and changed the penalties. Both the legislative history concerning the purposes of the legislation and the inclusion of a specific saving clause apparently reflect congressional intent to let the pre-repeal law control pre-repeal violations. We submit, therefore, that the application of 1 U.S.C. 109 to this case would appear to be required.

CONCLUSION

We believe the conflicting views of the courts on the issue here involved should be resolved to avoid unequal treatment of persons on the basis of the location of the institution in which they are incarcerated. But it does not necessarily follow that plenary consideration with oral argument is warranted. Since the Court has recently had the benefit of full briefing and argument on the issues presented herein, we suggest that summary disposition may be appropriate.

526-732—73——8

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1973.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 72-1842

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, APPELLANT

v.

WARDEN, LEWISBURG PENITENTIARY

(D. C. Habeas Corpus No. 1435)

Appeal From the United States District Court for the Middle District of Pennsylvania

Submitted May 14, 1973

Before GIBBONS and ROSENN, *Circuit Judges.*

Harry C. Batchelder, Jr., Esquire, John J. Witmeyer, III, Esquire, John B. Sherman, Esquire, for appellant, *Stewart Dalzell, Esq.,* Drinker, Biddle & Reath, Philadelphia, Pa., counsel for appellant.

S. John Cottone, Esquire, Harry A. Nagle, Esquire, for appellee.

OPINION OF THE COURT

(Filed August 27, 1973)

ROSENN, *Circuit Judge.* The major question raised by this appeal is whether a prisoner, ineligible for parole at the time he was sentenced under the provisions of the penal statute for which he was convicted, became eligible for parole when the penal

statute was subsequently repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Resolution of the question requires analysis of: (1) the proper forum in which to make such a claim of parole eligibility, (2) the nature of parole and its relation to sentencing, and (3) two congressional "saving provisions" for repealed criminal statutes.

Benigno Marrero was tried to a jury and convicted on May 27, 1970, in the United States District Court for the Southern District of New York, of possessing and selling heroin in violation of 21 U.S.C. §§ 173 and 174 and 26 U.S.C. §§ 4701, 4703, 4704(a), 4771(b), and 7237(a). As a second offender, he was sentenced to mandatory minimum terms of ten years on each of two counts, the sentences to run concurrently. His conviction was affirmed by the Second Circuit. 450 F.2d 373 (2d Cir. 1971), *cert. denied,* 405 U.S. 933 (1972). He now appeals the denial on July 26, 1972, by the United States District Court for the Middle District of Pennsylvania of his petition for writ of habeas corpus.

In his habeas petition, appellant alleged that he was being unlawfully detained because 26 U.S.C. § 7237 (d),[1] which was in effect at the time of his sentencing

[1] 26 U.S.C. § 7237(d) provided:
"Upon conviction—
"(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or
"(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,"
the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24–201 and following), as amended, shall not apply.

and precluded his parole eligibility, had been repealed effective May 1, 1971, by § 1101(b)(4)(A) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, 84 Stat. 1292. He alleged that repeal of § 7237(d) made him eligible for parole in September 1973 under 18 U.S.C. § 4202. He did not allege that the United States Board of Parole or any other authority had decided that § 4202 would not be applied to him or that he would not be eligible for parole in September 1973, but he contended that habeas corpus is nonetheless an appropriate remedy at this time to determine his status vis-a-vis parole. We think habeas relief is merited and therefore reverse the district court's denial of relief.

I

The first question that we must address is the applicability of the exhaustion of administrative remedies doctrine. That doctrine deserves comment because appellant did not seek any relief from the Board of Parole before instituting this action.

The basic premises underlying the exhaustion requirement are that (1) judicial review may be facilitated by allowing the appropriate agency to develop a factual record and apply its expertise, (2) judicial time may be conserved because the agency might grant the relief sought, and (3) administrative autonomy requires that an agency be given an opportunity to correct its own errors. *Waddell* v. *Alldredge*, No. 72–1417 (3d Cir., filed June 29, 1973); *McKart* v. *United States*, 395 U.S. 185, 194–95 (1969).

We find none of the basic goals of the administrative exhaustion doctrine would be served in the present case were we to direct the appellant to seek relief

from the Board of Parole before judicial action. The issue here of the availability of parole under § 4202 involves only statutory construction. No administrative record or expertise is therefore required. The second and third premises above are also inapplicable because the Board of Parole has taken a firm position that § 4202 is unavailable to prisoners in appellant's situation.

Whether to require exhaustion is discretionary. If pursuing an administrative remedy would be futile, the requirement may be waived. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U.S. 24, 34 (1934); *see* 3 *Davis, Administrative Law Treatise,* § 20.07, at 99 (1958). We are especially reluctant to require exhaustion when, as here, both parties agree administrative proceedings would be futile. Moreover, as appellant points out, this habeas petition was filed in January 1972, and more than 19 months have already elapsed. Subjecting him to any further unnecessary delay would be unconscionable. The unfairness in such unnecessary protraction of litigation partially underlay the Supreme Court's decision in *Peyton* v. *Rowe,* 391 U.S. 54 (1968), that a prisoner serving consecutive sentences can challenge his later sentences before beginning to serve them. 391 U.S. at 64. We therefore decline to invoke the exhaustion doctrine here.[2]

[2] In *Soyka* v. *Alldredge*, No. 72-1918 (3d Cir., filed July 10, 1973), we held that a habeas corpus petition seeking credit for time spent in custody prior to sentencing was premature pending exhaustion of administrative remedies. The petitioner claimed that he was legally entitled to credit under 18 U.S.C. § 3568. We dismissed the petition because he did not show that "the Attorney General or the Director of the Bureau of Prisons has refused to afford him credit to which he is legally entitled." We reasoned:

"There are no circumstances present which suggest that the Attorney General will fail to perform his duty and grant credit

We also reject the Government's contention that because parole eligibility does not automatically entitle a prisoner to parole, "the proper remedy would not be habeas corpus but rather a petition for writ of mandamus to compel the Parole Board to consider appellant for parole." Immediate and unconditional release is not the only remedy available in a habeas corpus proceeding. *Peyton* v. *Rowe,* 391 U.S. at 66–67. An improper denial of parole eligibility is a sufficient restraint to justify habeas corpus relief. *Williams* v. *Peyton,* 372 F.2d 216 (4th Cir. 1967); *Martin* v. *Commonwealth of Virginia,* 349 F.2d 781 (4th Cir. 1965); *see also Halprin* v. *United States,* 295 F.2d 458 (9th Cir. 1961).[3]

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where it is warranted. Soyka should therefore exhaust the administrative means at his disposal before judicial review will be appropriate."

Nonetheless, *Soyka* is inapposite here because both parties acknowledge that the official position of the United States Board of Parole is that parole under § 4204 was made unavailable by 26 U.S.C. § 7237(d) for persons convicted of an offense committed before May 1, 1971, the effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

[3] *Peyton* v. *Rowe*, overruling *McNally* v. *Hill*, 293 U.S. 131 (1934), and thereby upholding habeas corpus jurisdiction to challenge an illegal sentence which a prisoner had not yet begun serving, does not necessarily dictate our conclusion in this case, because an illegal sentence to be served in the future would definitely deprive the prisoner of his freedom at some later date. Marrero would not definitely be deprived of freedom by the failure to hold a parole hearing because the parole board, in its discretion, could deny parole. Nonetheless, we think *Peyton's* liberal view of the breadth of the writ indicates the propriety of habeas corpus jurisdiction here.

Jones v. *Cunningham*, 371 U.S. 236 (1963), also suggests this conclusion. In *Jones*, the Court found habeas jurisdiction to challenge a sentence on which the prisoner had been paroled and, thus, released from prison. It held that the restraints im-

II

The district court denied appellant's habeas petition on two grounds: (1) it lacked jurisdiction since a remedy in the sentencing court is provided by 28 U.S.C. § 2255; and (2) the repeal of § 7237(d) did not affect appellant's eligibility for parole because he was convicted and sentenced prior to the effective date of the repeal. We think the court erred on both grounds.

Section 2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears

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posed on a parolee's freedom were sufficient to invoke the "great Writ." It noted:

"[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." 371 U.S. at 243.

Reviewing *Peyton* and *Jones*, the Fourth Circuit reached exactly the same conclusion as we have, in *Martin* v. *Commonwealth of Virginia*, 349 F. 2d 781, 784 (4th Cir. 1965):

"We therefore hold, in keeping with the spirit of these developments, that because Martin's escape and larceny convictions bar his eligibility for parole, he is 'in custody' within the meaning of 28 U.S.C.A. § 2241."

The district court in the instant case did not discuss the question of the ripeness of the issues for adjudication. At the time Marrero's habeas petition was filed, he was unquestionably ineligible for parole under 18 U.S.C. § 4202, because one-third of his sentence had not expired. According to a letter dated July 18, 1973, submitted to this court by the United States Attorney, however, Marrero's parole eligibility date under § 4202 would be June 20, 1973, not September 1973 as appellant alleged. There is, therefore, no problem of ripeness at this time, and we need not decide whether *Peyton* v. *Rowe*, 391 U.S. 54 (1968), would justify habeas corpus relief prior to the eligibility date.

> that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Relief is available under § 2255 for a prisoner who claims he has been sentenced illegally. The statute requires him to "move *the court which imposed sentence* to vacate, set aside or correct the sentence." [Emphasis added.]

In the present case, however, appellant has not requested vacation or correction of his sentence. His petition, although not very specific, in essence requests a determination of the applicability of a statute, the operation of which is automatic and beyond the control of the sentencing court. We note that the judgment of conviction mentions neither § 7237(d) nor appellant's eligibility for parole. Section 2255 therefore does not require that appellant return to the Southern District of New York, his sentencing court, to seek the relief he now asks. *Soyka* v. *Alldredge,* No. 72–1918 (3d Cir., filed July 10, 1973); *Halprin* v. *United States,* 295 F.2d 458, 459 (9th Cir. 1961).

Our conclusion that relief need not be sought from the sentencing court is supported by the nature of the parole decision and its clear differences from sentencing. Parole is vested, subject to statutory limitations, in an administrative parole board which, in the federal system, is appointed by the President. 18 U.S.C. § 4201.[4] The parole mechanism provides the

[4] *See United States* v. *Bradley,* 41 U.S.L.W. 4368, 4370 n. 6 (1973):

"The decision to grant parole under § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated."

prisoner with an administrative release prior to the completion of his judicially prescribed sentence. It is aimed at rehabilitating the parolee and facilitating his reintegration into socety by the time his sentence expires. Its importance lies in offering prisoners an opportunity for release from penal institutions before the expiration of their maximum term and, hopefully, for their successful reintegration into society as useful, productive persons. It also serves to relieve society from the heavy burden of keeping persons in prison. *See Morrissey* v. *Brewer,* 408 U.S. 471, 477 (1972); Comment, *The Parole System,* 120 U. Pa. L. Rev. 282, 284 (1971). Parole has become an integral and vigorous part of our modern penological system. "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U.S. at 477. Parole thus involves implementing a prisoner's sentence in the manner deemed best suited to attain the primary goals of criminal punishment, rehabilitation of the prisoner and protection of society from future deviant behavior. It does not involve modification of the sentence imposed.

The parolee is not granted the unconditional freedom of the ordinary citizen. The prisoner, upon parole release, agrees to abide by certain rules during the balance of his sentence. The rules are designed to accomplish the parole purposes of rehabilitation of the prisoner and protection of society. The parolee is usually required to report regularly to a parole officer and sometimes to make written reports of his activities. His travel is ordinarily limited. He is forbidden from associating with other parolees or convicted criminals. In addition, permission is often required before changing employment or marrying. *See* 408 U.S. at 478; 120 U.Pa. L. Rev. at 308.

For these reasons, we have concluded that the requested relief in this case is not authorized under § 2255 and that a habeas corpus petition presented to a district court judge in the district in which the prisoner is incarcerated is therefore proper.

III

We thus meet the basic issue: is the prisoner eligible for the benefits of § 4202? It is first necessary to understand the statutes involved. 18 U.S.C. § 4202 authorizes the release on parole of a federal prisoner after serving one-third of his sentence. 26 U.S.C. § 7237(d) prohibited parole under § 4202 for prisoners convicted of certain narcotics offenses, including Marrero's crimes. Section 7237(d), however, was repealed effective May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, § 1101(b)(4)(A), 84 Stat. 1292. The question is whether that repeal is effective as to Marrero, who was convicted and sentenced on May 27, 1970. The answer depends on the interpretation of the savings provision of the 1970 Act, § 1103(a), 84 Stat. 1294, and the general statutory savings provision, 1 U.S.C. § 109.

Section 1103(a) of the Comprehensive Drug Prevention and Control Act provides:

> Prosecution for any violation of law occurring prior to the effective date of section 1101 [(May 1, 1971)] shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof.

The effect of § 1103(a) on parole eligibility under § 4202 has not been decided by the Supreme Court. Its decision in *Bradley* v. *United States,* 41 U.S.L.W.

4368 (U.S., Mar. 5, 1973), on a related matter, however, is instructive. *Bradley* involved parole eligibility under 18 U.S.C. § 4208(a), which authorizes the court imposing sentence to designate *in the sentence* early parole eligibility.[5] Congress had specifically provided that § 4208(a) does not apply to any offense carrying a mandatory penalty. Pub. L. 85–752, § 7, 72 Stat. 847 (1958). The Comprehensive Drug Abuse Prevention and Control Act of 1970 repealed the mandatory sentence for the crime Bradley committed. Bradley committed the crime before the effective date but was sentenced after it. The Court held that the repeal did not render Bradley eligible for parole under § 4208(a) because of the savings clause in § 1103(a). It reasoned that the word "prosecution" in § 1103 included sentencing and that sentencing constituted the judgment in a criminal case. Because the "decision to make early parole available under § 4208(a) must be made '[u]pon entering a judgment of conviction'" and therefore prior to the termination of the prosecution, it concluded that § 1103(a) barred parole under § 4208(a). The Court noted that the availability of parole under § 4202 "is a rather different matter, on

[5] 18 U.S.C. § 4208(a) reads:

"Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

which we express no opinion." 41 U.S.L.W. at 4370. Justices Brennan and White concurred in the decision but indicated without discussion their belief that parole under § 4202 was similarly unavailable.

Although *Bradley* did not decide the § 4202 question, it made clear that the decision to grant parole *under § 4202 occurs* "long after sentence has been entered and the prosecution has terminated."[6] In light of that statement and our previous analysis of the nature of parole, we hold that "prosecution" under § 1103(a) does not include the § 4202 parole eligibility decision, and therefore, does not bar Marrero from parole eligibility. A granting of parole does not affect the mandatory minimum sentence, only how it is executed.

United States v. *Caldwell,* 463 F.2d 590 (3d Cir. 1972), *United States* v. *Fiotto,* 454 F.2d 252 (2d Cir. 1972), and *United States* v. *Stephens,* 449 F.2d 103 (9th Cir. 1971), are inapposite here because they did not involve the effect of § 1103(a) on § 4202, the general parole statute; they involved, as did *Bradley,* decisions pertaining to sentencing.

The only remaining issue is the effect of 1 U.S.C. § 109, which provides in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so provide, and

[6] The Supreme Court has, in another context, specifically held that the "criminal prosecution" does not include the parole decision. In *Morrissey* v. *Brewer,* 408 U.S. at 480, the Court held that the rights guaranteed by the sixth amendment in "criminal prosecutions" do not apply in a parole revocation proceeding. It noted that, "Parole arises after the end of the criminal prosecution, including imposition of sentence."

> such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

This general savings statute was intended to obviate the common law's technical abatement of a prosecution by the repeal of the statute under which it proceeded. *Hamm* v. *Rock Hill*, 379 U.S. 306, 314 (1964). Therefore, the statute's purpose would not be furthered by applying it to preclude Marrero's parole eligibility under § 4202. His conviction and sentence will remain intact even if he is paroled. We therefore hold that permanent parole ineligibility is not a "penalty" incurred under § 7237(d).[7] We read § 7237(d)'s preclusion of parole as a dated legislative judgment as to the manner by which the actual penalty, i.e., the prison sentence, should be effectuated. To read it otherwise would preclude carrying out the apparent congressional judgment, in repealing the parole ban, that the rehabilitative goals of the criminal justice system will be furthered by parole. Moreover, we can find no rational basis that would justify barring parole for persons convicted of crimes committed before the Act's effective date, yet granting it to persons convicted of subsequent crimes. To the extent parole aids prisoner rehabilitation and consequently strengthens the tensile fabric of society, it is important that we avoid technical, purposeless construction which runs counter to the congressional plan to encourage prison rehabilitation.

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[7] Although we stated in *Caldwell* that 1 U.S.C. § 109 preserves the "penalties" prescribed by § 7237(d), 463 F. 2d at 594, we did not decide that the bar to parole under § 4202 was a "penalty."

The judgment of the district court will be reversed and the case remanded for the entry of judgment granting the writ of habeas corpus with the direction that Marrero be released if he is not considered for parole within 60 days.

To the clerk:

Please file the foregoing opinion.

_____

Circuit Judge

Dated:

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 72-1842

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, APPELLANT

v.

WARDEN, LEWISBURG, PENITENTIARY

(D.C. Habeas Corpus No. 1435)

On Appeal From the United States District Court for the Middle District of Pennsylvania

Present: GIBBONS and ROSENN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 26, 1972, be, and the same is hereby reversed and the cause is remanded to the said District Court with directions to enter judgment granting the writ of habeas corpus with the direction that Marrero be released if he is not considered for parole within sixty days in accordance with the opinion of this Court.

Attest:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

August 27, 1973.

APPENDIX C

United States District Court for the Middle District of Pennsylvania

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, No. 69792–158

v.

WARDEN, LEWISBURG PENITENTIARY

HABEAS CORPUS NO. 1435

MEMORANDUM AND ORDER

Relator, Benigno Marrero, was convicted on two counts in the United States District Court for the Southern District of New York of receiving, concealing and facilitating the transportation and concealment of heroin in violation of 21 U.S.C. §§ 173 and 174, and of purchasing, dispensing and distributing cocaine not in or from the original stamped package in violation of 26 U.S.C. §§ 4701, 4703, 4704(a), 4711 (a) and 7237(a). As a second offender he was sentenced to 10 years imprisonment on each count to run concurrently. His sentence on the first count was prescribed by Section 174 of Title 21 which states, in pertinent part, that all provisions relating to sentencing are to be governed by Section 7237(d) of the Internal Revenue Code of 1954. The sentence on count two was prescribed by Section 7237(a) of Title 26 and was also governed by the provisions of 7237(d). The importance of Section 7237(d) for our purposes is that it specifically states that in the case of a violation of a

law relating to narcotic drugs, Section 4202 of Title 18 shall not apply.[1] Consequently at the time relator was sentenced, he was not eligible for parole under Section 4202. Relator filed this habeas corpus petition on February 24, 1972, contending that he is now being held in custody unlawfully inasmuch as Section 7237 (d) was fully repealed on May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1242 et seq., 21 U.S.C. §§ 801 et seq., and thus, the provisions of 18 U.S.C. § 4202 are not applicable to him, making him eligible for parole after one-third of his sentence has been served. Respondent, the Warden at the United States Penitentiary in Lewisburg, Pennsylvania, where relator is presently confined, challenges the petition alleging that (1) this Court is without jurisdiction because relator has an adequate remedy in the sentencing court under Title 28 U.S.C. § 2255 or a motion for correction or reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure, and (2) the Act of 1970 contained a "savings provision" stating that prosecutions for any violation of law occurring prior to May 1, 1971, shall not be affected by the new Act.

JURISDICTION

Relator concedes that 28 U.S.C. § 2255 is the proper remedy for a federal prisoner to attack the sentence imposed but argues that "parole eligibility is a question distinct and apart from the propriety of sentence" and that since § 2255 extends only to correcting sentence, habeas corpus is the proper procedure to

[1] 18 U.S.C. § 4202 provides, in pertinent part: "A Federal prisoner wherever confined and serving a definite term or terms of over one hundred and eighty days . . . may be released on parole after serving one-third of such term or terms. . . ."

determine future parole eligibility. Of course, if § 2255 relief is not available, then relator would not be obliged to apply to the sentencing court as § 2255 requires, viz:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.* [Emphasis supplied.]

I cannot accept relator's view on the limitations of § 2255. The United States Supreme Court has held conclusively that § 2255 was enacted to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined, *Hill* v. *United States,* 368 U.S. 424, 427 (1962), and that, in appropriate cases, it can also be utilized to provide a more flexible remedy. *Andrews* v. *United States,* 373 U.S. 334, 339 (1963). Moreover, if relief is possible under § 2255, it is the exclusive remedy and habeas corpus is barred for a federal prisoner. Wright, Federal Practice and Procedure: Criminal § 591. Relator must show, therefore, that a § 2255 motion is inadequate or ineffective to test the legality of his detention. He attempts to do this by contending that he does not seek to have his sentence corrected, i.e., ten years imprisonment, but merely seeks a determination of when he is eligible for parole maintaining that his "* * * sentence will not be affected if he is found eligible for parole * * *" However, part of the sentence imposed on May 27, 1970,

albeit not explicitly spoken, was that he was not eligible for parole under 18 U.S.C. § 4202. And even if it were not, the question raised as to parole eligibility certainly involves the legality of his detention even though immediate release is not forthcoming. It is not necessary, as relator claims, that § 2255 requires that a movant request immediate release from confinement as it expressly authorizes the District Court to "* * * discharge the prisoner or resentence him or grant a new trial *or correct the sentence as may appear appropriate*". (emphasis supplied) Relator makes many interesting arguments including that of parole eligibility being a question of status and not sentence; that the sentencing court cannot resolve the question of § 4202 parole eligibility; and that the availability of § 4202 is purely a question of statutory interpretation. Nevertheless, in my opinion, § 2255 is broad enough[2] and flexible enough to provide the remedy which relator seeks and, consequently, habeas corpus will not lie in this district.[3]

MERITS

Assuming arguendo, that this court has habeas corpus jurisdiction to decide the issues raised, I would

[2] Section 2255 expressly applies to a federal prisoner "in custody" and recently, in *Peyton* v. *Rowe*, 391 U.S. 54 (1968) the concept of custody was broadened in that a state prisoner was held to be in custody to the extent that he may in a federal habeas corpus proceeding challenge the constitutionality of a sentence scheduled for future service. Such broadening would be presumably applicable to § 2255 motions. See Wright, Federal Practice and Procedures: Criminal § 582; *Kaufman* v. *United States*, 394 U.S. 217 (1969).

[3] The applicability of Rule 35 of the Federal Rules of Criminal Procedure to this situation is a matter more appropriately left to the sentencing court.

rule against relator on the merits. In *United States* v. *Bradley,* 445 F. 2d 1181 (1st Cir. 1972), defendants were convicted on May 6, 1971 (five days subsequent to the effective date of the new Act) of a conspiracy occurring in March 1971, to sell a narcotic drug, and sentenced to a five-year term, the minimum punishment for first offenders under § 7237(b). Defendants contended in their appeal that since the new Act was in force when they were sentenced, the sentencing court was not bound by § 7237(d) and should have considered other sentencing alternatives, such as suspending sentence, granting probation or providing for parole. The court rejected this argument and held that a reading of the specific saving provision of the new Act, § 1103(a), and the general saving provision as originally enacted in 1871, 1 U.S.C. § 109, compelled the conclusion that narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense. Section 1103(a) states:

> Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof.

The Court, reading 1103(a) against the background of § 109, held that the word "prosecutions" included the act of sentencing so that the limitations of § 7237 (d) continued to apply.

> Section 109 provides in pertinent part:
> The repeal of any statute shall not have the effect to release or extinguish any *penalty,* forfeiture, or *liability* incurred under such statute, *unless the repealing Act shall so expressly provide,* and such statute shall be

> treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty forfeiture or liability. [Emphasis supplied.]

Proceeding further, the court in Bradley stated that § 109 refers unambiguously to "any statute", whether that statute defines a crime, prescribes a penalty, or elaborates on the nature of the penalty to be imposed. The court summed up, as follows:

> Section 7237(d) was part of the "liability incurred" by violation of § 7237(b). That is, had trial and sentencing been simultaneous with the offense, the defendants herein clearly would have been ineligible for suspended sentences, parole, or probation. Regardless of whether the legislative grant of these sentencing alternatives is viewed as a release of penalty, under the mandate of § 109 the repealed statute, § 7237 (d) is "[to] be treated as still remaining in force."

As a result, the sentencing court was held to be powerless to impose sentencing alternatives, including parole. See also *United States* v. *Fiotto,* 454 F. 2d 252 (2d Cir. 1972).

More recently our Court of Appeals in *United States* v. *Brickley,* et al., decided July 5, 1972, —— F. 2d ——, rejected the Stephens rationale and chose to follow Bradley and Fiotto, in the following language:

> Accordingly, we must construe the "savings provisions" of Section 1103(a) to mean that sentencing for violations of the old Act shall not be affected by the new Act. Having reached this conclusion, it becomes clear that the pro-

visions of 1 U.S.C. § 109 have the effect of preserving the penalties prescribed by §§ 4705(a) and 7237(d), since Congress did not otherwise provide. [Emphasis supplied.]

Consequently, I conclude that the denial of parole eligibility in § 7237(d) is a penalty preserved by the savings provisions of § 1103(a) and 1 U.S.C. § 109.

WILLIAM J. NEALON,
United States District Judge.

Dated: July 26, 1972.

ORDER

This 26th day of July, 1972, in accordance with the memorandum this day filed, the petition of Benigno Marrero for a Writ of Habeas Corpus is denied.

WILLIAM J. NEALON,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973